

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1360 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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BHULSING S RAJPUT

Versus

ADITYA HARSHVADAN MANGALDAS

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Appearance:

MR VC DESAI for Petitioner

MR MB BUCH for Respondent No. 1

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CORAM : MR.JUSTICE S.D.SHAH

Date of decision: 11/07/97

ORAL JUDGEMENT

1. This Civil Revision Application is filed under Sec. 115 of the Code of Civil Procedure by the original opponent No.5, inter alia challenging the legality and validity of the order passed by the Small Causes Court Judge dated 29th September, 1990, whereby he allowed the application of Aditya Harshvadan Mangaldas being PSRP Application No.45 of 1983 which was filed under Section

41 of the Presidency Small Cause Court Act, inter alia, alleging that the opponents were the licensee of the premises bearing MC No. 1761, 1761/4 bearing Survey No. 3217/A/1 of Shahpur Ward, situate near Rustamali's Dhal, Khanpur, Ahmedabad. In such an application, he also impleaded the present petitioner as opponent No.5 as well as present opponents No. 2 to 5 so that he may not have any difficulty in ultimately executing the warrant for possession, in case the application was granted. Such application was resisted by the present petitioner by filing his reply and contending that he was not the licensee and that he was the tenant of the suit premises and not liable to be evicted under Section 41 of the said Act. It will not be out of place at this stage to note that the original opponent No.5, namely, the present petitioner also filed HRP suit No. 145 of 1983 against the original applicant in the Small Causes Court at Ahmedabad, inter alia, contending that he was the tenant of the suit premises and not licensee as contended by the applicant. Unfortunately, the said suit was dismissed for default and no intimation thereof was given to the opponent No.5. Thus, a real dispute of tenancy which would have been gone into in a substantive suit filed by the opponent No.5 of the original application (present petitioner) could not be gone into and the court proceeded with the proceeding under the Bombay Presidency Small Causes Court Act. It is unfortunate that such a statute which provides for summary eviction of a person in possession over a long period can be thrown out of such possession on the allegation of the owner that he was merely a licensee. The present petitioner resisted the proceeding by producing documentary evidence at Exhibits 74 and 77 in the nature of School Leaving and Birth Certificate, Exhibit 65 and 66 being the report of the Commissioner and the map of the suit premises and the deposition of opponent No. 1, 4 and 5 and one Abdul Manan Abdul Rahman. The trial court on appreciation of evidence but without at all appreciating the deposition of Abdul Manan Abdul Rahman, recorded a finding that application under Section 41 of the said Act was maintainable and that the present petitioner was liable to be evicted. By judgment and order dated 29th of September, 1992, the trial court allowed the application and directed all opponents including the present petitioner to hand over the possession of the premises to the original applicant on or before 30th November, 1992. Trial court also directed the bailiff of the court to give possession of the suit premises from the tenant to the applicant under a warrant of possession after expiry of 30th November, 1992.

2. Much could be said about such draconian provision of an eviction of a person who has been staying in the premises over a number of years simply on the allegation that he was a licensee and liable to be summarily evicted. However, that being not the nature and scope of enquiry before this court. This court would confine itself to the submission made by Mr. V.C. Desai for the present petitioner. He has vehemently submitted that when the court has failed to refer to and consider very important evidence which was in the nature of a deposition of Abdul Manan Abdul Rahman, the trial court has committed jurisdictional error which could be corrected under Sec. 115 of the Code of Civil Procedure and in this connection he has invited my attention to the decision of the Apex Court in the case of MASJID KACHA TANK, NAHAN v. TUFFAIL MOHAMMED, reported in 1991 SC 455, where the Apex Court has taken the view that it is well settled position in law that under Sec. 115 of the Code of Civil Procedure, the High Court cannot reappreciate the evidence and cannot set aside the concurrent findings of the Courts below by taking a different view of the evidence. The High Court is empowered only to interfere with the findings of fact if the findings are perverse or there has been a non-appreciation or non-consideration of the material evidence on record by the Courts below. In the present case, as pointed out by Mr. V.C. Desai, learned counsel appearing for the petitioner, admittedly, the deposition of one witness is not even referred to and not even appreciated and on going through the deposition of the said witness, this court shall have to say that it was material evidence which could have helped the present petitioner in establishing his case. Non-considering and non-appreciating the evidence of such a witness, would obviously affect the jurisdiction of the trial court and when the court has exercised the jurisdiction with material irregularity which would ultimately affect its jurisdiction, this court under Section 115 of the Code of Civil Procedure can interfere with the order of the trial court. In view of the aforesaid legal position, this Civil Revision Application is required to be allowed. The same is allowed. The judgment and order passed by the Small Causes Court at Ahmedabad dated 29th September, 1992 is quashed and set aside and the matter is remanded to the Small Causes Court for consideration of the evidence of the witness, whose evidence is not at all considered and appreciated.

3. In one document to which my attention is specifically invited which is produced with the list at Exhibit 39 and at Exhibit 47 also deserves to be noted.

Such evidence which was in existence on the date on which the application was filed was not produced by the original applicant, but it came to be produced only in September, 1991. A mere look at the writing, prima facie, shows that the body of the writing is in the handwriting of a different person than one Mukesh Babubhai and it also, prima facie, appears that the document requires proper appreciation and consideration as regards its genuineness and its real execution. Unfortunately, the trial court has very cursorily without keeping in mind the salient features of appreciation of documentary evidence in the light of the oral evidence, relied upon such a writing for evicting a person who has been in possession of the suit premises since number of years by invoking the powers under Sec. 41 of the said Act. The judgment and order of the trial court is, therefore, also liable to be quashed and set aside and the same is quashed and set aside. The warrant of possession which is ordered to be issued by the trial court is also quashed and set aside and the matter is remanded to the trial court to decide the same afresh in light of the observations made in this judgment. It will be open to the present petitioner to raise any defence available to him in the suit or under the provisions of the said Act. Rule is accordingly made absolute. There shall be no order as to costs.

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